Evidence Outline  
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- Relevance
  - Undemanding standard for relevance
    - Philosophy is that anything with any bearing on anything at all that matters to the lawsuit, it ought to be admitted
    - Strong preference to let the fact finder hear it
  - Key element in evidence law – every other rule comes from this rule
  - Different from sufficiency
    - Just b/c relevant does not make it enough to win
    - Only has to make it more or less probable than without the evidence, does not need to prove or make definite
  - 401 – Definition of Relevance
    - Relationship between the item of evidence and the point it is offered to proof
    - Logical relevancy
    - Probativeiveness
    - Any tendency to make it more or less probable
    - Relationship between the point it is offered for and the facts of the case
    - Necessary not enough to be admissible
  - 402
    - Relevant evidence is usually admissible
    - Irrelevant is never admissible
  - 403
    - Relevant evidence can be excluded if the probative value of the evidence is outweighed by
      - 3 dangers
        - Unfair prejudice
          - If a fact finder might react to aspects of evidence in a way that is not supposed to be part of the evaluative process
          - Giving unfair weight to a piece of evidence
        - Confusion of the issues
        - Misleading the jury
      - 3 considerations
        - Considerations of undue delay
        - Waste of time
        - Presentation of accumulated evidence
    - Places the burden on the party seeking exclusion of the evidence
      - Heavy burden to prove
        - Not just that it is prejudicial but that it is more prejudicial than it is probative
      - Exclusion is merely permissive, not mandatory
• Seldom overturned
  o If on review court must determine if the ruling was an abuse of discretion. If so, the court must then determine if it was harmless error or not.

- Courts do not consider the credibility of the evidence when determining probative value

- Possibilities beyond exclusion of the evidence
  • Limiting instructions – instructions to the jury in what way they can use the information given to them
  • Redaction – remove the offensive part of the evidence
    o Crop photos, remove words, etc
  • Stipulation
    o Old Chief case
      ▪ Can stipulate but often want to prove their case their own way. Courts hesitant to make it a rule.

  o 404 – Character evidence generally
    • 404(a) General prohibition against the circumstantial use of character evidence to show action and conformity with the character
      • Rule b/c believe that propensity evidence can lead to wrong conclusion or unfair prejudice
      • Non-propensity uses include knowledge, intent, absence of mistake or accident
    • Exceptions
      o 404(a)(1) – character of the accused
        ▪ Δ can introduce evidence of his own character to support inference that he didn’t commit the crime.
          • Can only do so through reputation or opinion witnesses (no specific acts)
            o Evidence can be personally based
        ▪ Prosecutor can cross-examine these witness’ about specific instances
          • Not to show propensity but to prove that witness does not know the Δ so well.
            o Did you know that last year Dennis left his fiancée at the altar?
          • Cannot use extrinsic evidence to prove specific instances
        ▪ Once Δ brings up such evidence, the prosecution can rebut with their own witnesses regarding the Δ’s character
• Must be pertinent
  • Can not enter evidence of Δ’s peacefulness in a case about fraud
  404(a)(2) – character of the alleged victim
  • Evidence of a pertinent character trait of the alleged victim offered by the accused or offered by the prosecution to rebut the same of the accused
    • In homicide cases the prosecution can bring in evidence of the victim’s character before Δ introduces such
    • If Δ introduces evidence of victim’s character, the prosecution can rebut with evidence on Δ’s character
  404(b) Prohibition against using prior bad acts to prove person’s character
    • The use of such evidence can be very prejudicial against the defendant
    • Courts sometimes let things in that may be questionable
      o Inclusionary approach – subject to other rules, when the evidence of prior bad acts is relevant and not offered to prove propensity, will be allowed in
        • FRE takes this approach, many things come in everyday
      o Exclusionary approach – Burden is on the prosecution to bring the evidence in
    • To use must
      o Give notice
      o Offer non-character purpose for the evidence
        • Proof of motive
        • Opportunity
        • Intent
        • Preparation
        • Plan
        • Knowledge
        • Identity
        • Absence of mistakes or accident
          • If accused of same crime three times, unlike to be a mistaken accusation
      o Show actual evidence that Δ actually committed the prior bad act
        • Is the evidence believable?
        • Can use even if the Δ was found not guilty b/c that is not guilty b/c there was not guilt beyond a reasonable doubt – this doesn’t
mean the lower standard for evidence allows it to come in
  o If there is another way to make the point without using the prior bad acts, court will require that it be done that way
  - Each side can legitimately introduce evidence on character at issue cases without implicating this rule
    • Such as negligence case – would have to show that employee has been negligent in the past to show that the employer was negligent in hiring them

  o 405
    - Methods to prove character
      • 405(a) Reputation or opinion
        o can use specific instances on cross
      • 405(b) Specific instance of conduct
        o Can only be used when character or trait of character of a person is an essential element of a charge, claim, or defense
          - It is an essential element if without the evidence there would be a directed verdict

  o 406 – Habit or routine
    - excluded unless relevant to show how one acted on a particular occasion.
      • Needs to be strong connection to the act in question
      • Judge should be convinced that the act is virtually automatic and repeated many times in the past
        o I.e. locking the car door – not being honest in general

  o 407
    - Subsequent Remedial Measures
      • Forbidden as evidence of negligence or the presence of a product defect.
        o Do not want to deter people from correcting defects or punish those for doing what is right
      • Evidence of such actions can be offered for other purposes such as proving ownership, control or feasibility or precautionary measures, if controverted, or impeachment.

  o 408
    - Compromise or offers to compromise
      • Forbidden to show liability
        o Both offer to pay and statements made in connection with negotiating a payment
          - This does not exclude evidence that is otherwise discoverable just b/c it is also included in negotiations.
Is admissible for purposes other than showing liability

- Rule is designed so that people who may settle to avoid the cost and time of litigation cannot have their settlements held against them.

- 409
  - Payment of medical or similar expenses
    - Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses resulting from an injury is not admissible to prove liability for the injury.
      - No clear definition of “similar expenses” will have to make arguments to have various items included in such.
      - No protection for statements made in connection to offers

- 410
  - Inadmissibility of pleas, plea discussions and related statements
    - The following is inadmissible in both criminal and civil cases against the defendant who made the plea or was a participant in plea discussions
      - A plea of guilty later withdrawn
      - A plea of nolo contender
      - Any statement made in the course of proceedings under Rule 11
      - Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or the plea is later withdrawn
      - Cannot be used for any reason

- 411
  - Liability Insurance
    - Evidence that a person was or was not insured against liability is not admissible upon the issue of negligence.
      - Afraid that jury will not be afraid to find liability b/c of it being “cost free” to the Δ or increase the liability b/c of deep pockets of insurance
    - Evidence of insurance against liability is admissible when offered for another purpose such as proof of agency, ownership or control, or bias or prejudice of a witness.
    - It is unclear whether this rule applies to product liability cases b/c of lack of recent amendments to the rule.

- Similar happenings
  - No specific rules but courts treat it as its own category
  - Must be able to show how similar the incident is to overcome 403 objections
• Unclear if similar nonhappenings are allowable – would have to show that they are extremely similar
  ▪ Raise questions about judge/jury line. Should be allowed in to let jury make determination but past instances can be so prejudicial so as to keep the evidence out. Judge’s should exclude if they find it highly prejudicial.

• Evidence in sexual assault trials
  o 412 – Evidence of Sexual Assault Victim
    ▪ allows the introduction of evidence of victim’s past sexual conduct if it can support a claim that someone other than \( \Delta \) was the source of injury or semen
    ▪ allows introduction of past conduct with \( \Delta \) to support a defense of consent.
    ▪ 412(b)(2) uses a balancing test comparing the probative value against dangers of unfair prejudice and harm to victim.
      • The probative value must substantially outweigh the harms.
      • Use 104(b) to determine if evidence comes in
  o 413 Evidence of similar crimes in sexual assault cases
    (a) In criminal case for sexual assault, evidence of \( \Delta \)’s commission of another offense of sexual assault is admissible and can be considered for any matter it is relevant for.
    (b) Must give notice
    (c) Does not affect the admission under any other rule
    • Covers attempted sexual assault as well
    • Not symmetrical – evidence of accused prior sexual history is admissible, but victim’s prior history will not be allowed in most cases
  o 414 Evidence of similar crimes in child molestation cases
    • Evidence of prior similar child molestation offenses are admissible and can be considered in any way relevant
    • Give notice
  o 415 Evidence of similar acts in civil cases concerning sexual assault or child molestation
    • In civil cases where there is a claim for damages or other relief based on a claim of child molestation or sexual assault, evidence of prior such offenses is admissible and can be considered as listed in rules 413 and 414.

• Witness Testimony
  o 601
    • Let the witness testify and allow fact finder to have all information surrounding the witness to determine credibility
    • Refuse to allow to testify only if there is a good reason
- Judge
- Jury
- Can’t tell the difference between a truth and a lie

  - 602
    - Cannot testify to things they do not have personal knowledge
    - Special exception for expert witnesses

  - 603
    - Oath given for all sworn testimony

- Authentication and Identification
  - Mainly with exhibits offered for evidence
  - Laying foundation for the evidence
  - Non-testimonial evidence requires this authentication more often b/c it cannot be cross-examined and is more persuasive with the jury

  - 901
    - The condition that there be enough evidence to support a finding that the matter in question is what the proponent claims it is, must be met for the item to be allowed into evidence. Such authenticated evidence may include
      - Testimony of witness w/ knowledge (901(b))
      - Nonexpert opinion on handwriting
        - Witness must be testify that he is familiar with the writing of that individual
      - Comparison by trier of fact or expert witness to a known item
      - Voice identification
        - Witness can make an id of voice if they can testify about familiarity with a reasonable basis to do so
      - Telephone conversations
        - Treated same as voice ids
      - Public reports or records
        - Can be authenticated through evidence that writing or data compilation came from the office where items of that type are kept. Can use a witness who knows and can testify about the sources of the exhibit.
      - Ancient documents
      - Process or system
      - Methods provided by statute
      - Distinctive Characteristics
        - Uniqueness of an object or an object’s appearance along with the circumstances of how it was found can provide adequate evidence for authentication
        - Chain of custody may be questioned as to the authenticity of the item

  - Self-Authentication – 902
Items listed under this rule do not need extrinsic evidence to be authenticated

- **Best Evidence Rule**
  - Regarding proof of contents of writing, recordings and photos
  - Must always ask
    - Does the best evidence rule apply?
      - Is it offered to proof the truth of its contents?
      - Is it non-collateral?
        - A contract in a breach of contract case is not collateral
    - Have the requirements been met?
      - Look at 1005-1007
      - Is an original or duplicate been offered? If there is none, must offer why?
  - **1001**
    - Definitions for best evidence rule
      - Original – object itself or any counterpart meant to be an original by the parties who created the first version of the document
      - Duplicate – a counterpart produced at the same time as the original or produced through photocopy.
  - **1002**
    - To prove the content of a non-collateral writing, recording or photograph, unless one of the special rules applies (for public records, summaries or proof by opposing party testimony) the proponent of the evidence must produce the original or satisfactorily account for its absence.
  - **1003**
    - Duplicate is admissible the same as an original unless
      - Genuine question is raised as to the authenticity of the original
      - In such circumstances it would be unfair for a duplicate to be admitted
  - **1004**
    - Original is not required and other evidence of the contents of a writing, recording or photograph is admissible if
      - Originals were destroyed or lost
      - Original not obtainable
      - Original in possession of opponent
      - Collateral matters not closely related to a controlling issue
  - **1005**
    - Public records authorized admissible can be admitted as a properly authenticates copy.
  - **1006**
- Summaries of voluminous writings, recordings or photographs that are not convenient to bring into court can be presented in a summary form.
  - Originals or duplicates must be available to opponent as desired

  1007
  - Contents of writings, etc, can be proved by testimony, deposition or written admission by the party against whom the object is offered, without accounting for the nonproduction of the original.

  1008
  - Role of the Court
  - There is overlap over who decides what is admissible
    - Judge decides if all the originals are lost but the jury determines if the original ever existed.

- Rule 104
  - Preliminary Questions
    - Questions of admissibility generally 104(a)
      - Qualifications of people to be a witness
      - Existence of a privilege
      - Admissibility of evidence determined by court
    - Relevancy conditioned on fact 104(b)
      - When evidence by itself is not relevant to any issue at trial but is relevant if the trier of fact has some other information
    - Hearing of jury
      - Hearings on the admissibility of confessions should be outside the hearing of the jury
      - All other preliminary matters shall be conducted when the judge requires or an accused is a witness and so requests
    - Testimony of accused
      - If testifying on preliminary matters, is not subject to cross
    - Weight and credibility
      - Rule does not limit the right to introduce before the jury evidence relevant to weight or credibility
    - Questions of fact are determined by jury, judge determines what the jury will hear
    - Admissibility always determined by the court
    - Usually uses 104(a) preponderance of the evidence standard
      - Am I persuaded that the fact is more likely true than not?
    - Sometimes lesser standard 104(b)
      - Could a reasonable person be persuaded to think that this is true?

- Hearsay
  - When one testifies to something, it goes through the “triangle”
    - Event – perception of event – retelling of event – jury interpretation of event
In hearsay this requires two triangles, the triangle for the original declarant and then the triangle for the testifying witness.

Is very difficult to entrust evidence on this double triangle b/c it holds a great deal of uncertainty.

Hearsay is an out of court statement offered into evidence offered to prove the truth of the matter asserted.

- If being offered to prove something else, it is ok.
  - For example, I talked to Dianne yesterday about the weather. If being offered to prove what Dianne said about the weather, not ok. If being offered to show that Dianne was alive yesterday because I spoke with her, ok.
- If essential to the claim, admissible
  - I.e. defamation
- Non assertive conduct is excluded from hearsay rules
- Silence does not quote out of court statements and so it is not hearsay

Not hearsay if

- 801(d)(1) The declarant testifies at trial or hearing and is subject to cross examination concerning the statement and the statement is
  - (A) inconsistent with the declarant’s testimony and was given under oath subject to penalty for perjury
    - Even when not admissible under this, can be used to impeach the witness
    - Grand jury testimony is ok b/c it was under oath
    - Even if declarant gets up and testifies that they do not remember their previous testimony, if the court believes that they truly do not remember, prior testimony can be used.
      - Though one cannot really cross examine a witness who does not remember, Owens says that all they need is to have the declarant in court available for cross examination – not that it has to be a fruitful cross examination.
  - (B) consistent with declarant’s testimony and is offered to rebut a charge against the declarant for recent fabrication or improper motive or influence
    - Statement must be made before the motivating event
    - Does not need to be under oath
or (C) one of identification of a person made after perceiving the person
  ▪ Does not have to be inconsistent but declarant must be subject to cross examination at the current proceeding
  ▪ Statement cannot be from memory but from actually seeing the person

801(d)(2) The statement is offered against a party and
  o (A) it is the party’s own statement or personal admissions
  o (B) it is a statement which the party has manifested an adoption or belief in its truth or
  o (C) it is a statement by a person authorized to make statements concerning the subject or
    ▪ Such as an attorney or other agent of the party
  o (D) it is a statement by the party’s agent concerning a matter within the scope of agency or employment made during this relationship or
    ▪ Duty or job responsibilities
  o (E) a statement by a coconspirator of a party during the course and furtherance of a conspiracy
  o The statement cannot be used to establish a declarant’s authority under (C), the agency or employment relationship and scope of it under (D), or the existence of a conspiracy and participation of declarant in such as under (E)

Assertive vs. non-assertive statements
  • Non assertive statements can be brought into court b/c there is not the same risks that come with hearsay.
  • Must show beyond a preponderance of the evidence (104(a)) that it was not an assertive answer
  • Examples
    o Assertive – Who killed this man? John did. The declarant intended to relay the message that John killed the man.
    o Non-assertive – Watch your step the sidewalk is icy. Was not intended to relay a message that the owner of the sidewalk was negligent.

803 - Hearsay Exceptions
  ▪ Declarant’s availability doesn’t matter
  ▪ 803(1) Present sense impressions
    ▪ Describing something as it happens or immediately afterwards
      o Phone calls ok if one is relaying the event
  ▪ 803(2) Excited Utterance
• Statement relating to the startling event or condition made while the declarant was under the stress of excitement caused by the startling event or condition
  o Stress or excitement has to be caused by the startling event
  o Not a hard and fast standard, depends on circumstances.
    ▪ Small child who cries days later at seeing the perpetrator may see be under the stress of the event
  o Not a strong standard required showing personal knowledge. Only 104(b), is there evidence enough that a reasonable person may be convinced that declarant had personal knowledge
  o Need some sort of evidence that the statement was made while under stress or excitement caused by the event

  803(3) Then existing mental, emotional or physical condition
  • Statement of declarant’s then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain or bodily health) but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant’s will.
    o Cannot use belief to prove the fact believed by Δ.
      ▪ I believe that beer is cheaper at Beer World can be used to show my belief, but not to prove that beer is cheaper at Beer World.
    o B/c of the inherent trustworthiness of personally held beliefs, the declarant does not need to be known.
    o Statements of plans involving other people is admissible to show the intent of others

  803(4) Statements of purposes of medical diagnosis or treatment
  • Statements made for the purpose of medical diagnosis or treatment and describing medical history or past or present symptoms, pain or sensations, or the start or general character of the cause or external source if it is reasonably pertinent to diagnosis and treatment.
    o Purpose of the statement is key to admissibility b/c it is what brings the reliability to the statement. (People who want to be made better don’t lie).
    o Can be statements of past condition “I had a headache yesterday” is admissible
Even if the medical exam was for litigation purposes only, it can be admissible.

Can even be made to non-medical persons.

- For example, husband says to wife “I have a headache.” If can be shown that this statement was made for the purpose of medical diagnosis or treatment, its ok.

Normally information regarding who or what caused the injury is not admissible. (John hit me, Clorax bleach burned me) If it is important to diagnosis, it may be allowed in. In child sex assault matters, it may be admissible b/c it would be crucial in treatment.

- Telling who is molesting the child is important to get the child out of the situation and end the abuse.

803(5) Past Recollections Records

- If witness has no recollection about a relevant fact but may have written notes about it at an earlier time, the written notes are admissible if 1) witness once had knowledge of the subject, 2) witness cannot recollect about the subject to be able to testify fully and completely and 3) the record was made when the witness had a fresh memory

  - The record can only be read in, it cannot be used as evidence unless the adverse party offers it.

  - FRE 612 allows for memory refreshers. Anything can be used to jog memory but does have to be shown to opposing side. Is not entered into evidence, simply used by the witness.

803(6) Business Reports

- For admission must show that 1) business record was made as part of usual activities of organization, 2) person with knowledge of what is said made the record, 3) record made close to time of occurrence

  - A witness must testify as to how this record meets these requirements

  - For every piece of evidence offered under this exception, the declarant must have personal knowledge and a business duty to keep such records.

  - There may be multiple hearsay and each piece must meet an exception

  - Trustworthiness is a concern, such as were these created just for litigation?

803(7) Absence of Record
• If it can be shown, as in (6) that a record is usually kept and that none is present in this situation

**803(8) Public Records**
• Reports in any form of public offices or agencies so long as it sets forth
  • (a) the activities of the office or agency or
  • (b) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding in criminal case matters observed by police or other law enforcement officials, or
    o courts have interpreted this to allow Δ to use such info against the state but not vice versa.
  • (c) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the source is not trustworthy.
    o Such as EEOC investigations, etc

**803(10) Absence of public record or entry**
• Show that there was a normal business record keeping process for such a thing and then that there is no such record here.
• Used to show that something did not happened
  o I.e., When some one is born, there is a birth certificate signed. There is no such thing here so therefore they did not have a child that year.

**803(17) Market report, commercial publications**
• I.e, market reports, phone books, etc

**803(18) Learned Treatises**
• Can be used instead of expert witnesses. Accepted as an authority on certain topic by all participants.
• Read in as evidence
• Established as reliability authority.

**803(21) and (22) Reputation evidence**
• Used for impeachment
  • times when evidence of a person’s reputation as to one’s character or evidence of previous crime conviction may be useful and otherwise admissible. It is hearsay though, so an exception is needed.

**803(9) – (23) Many more exceptions**
• **804** -Hearsay exceptions when the declarant is unavailable

**804(a) Definition of unavailability**
• (1) exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement or
  o must be claimed in court and okayed by judge
(2) persists in refusing to testify concerning the subject matter of the statement despite an order to do so or
(3) testifies to a lack of memory on the subject matter of the declarant’s statement or
  o must testify in court and be available for cross examination on the matter, cannot submit affidavit that says witness has no memory
(4) is unable to be present or to testify b/c of death, or then existing physical or mental illness or infirmity or
(5) is absent from the hearing and proponent of the statement has been unable to procure the declarant’s testimony by process or other reasonable means
A declarant is NOT unavailable if exemption, refusal, claim of memory loss, inability or absence is due to the wrongdoing if the proponent of a statement for the purpose of preventing the witness from attending.
This list is not exhaustive and other reasons for unavailability may be tried

804(b) Exceptions to hearsay when declarant is unavailable
804(b)(1) Former testimony
  o Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition, if the party against whom the testimony is offered, or in a civil action a predecessor in interest, had the opportunity and similar motive to develop testimony by direct, cross or redirect examination.
    ▪ Any witness who saw or heard the previous testimony can testify to it at trial. The adoption of prior court record is the best b/c it is the most trustworthy, but even someone who watched the trial can be brought in.
    ▪ May not have the same motive to cross examine if the matter was unimportant previously
804(b)(2) Dying Declarations
  o A statement concerning the cause or circumstances of what the declarant believes is impeding death. Only admissible if the declarant believes death is imminent and only admissible in a homicide prosecution or civil cause of death trial.
    ▪ Need to look into motivations of statement to see if there may have been other reasons for the statements.
804(b)(3) Statement against interest
  o Declarant does not need to be a party but must be unavailable and show that when declarant made the
statement, it had the potential to harm an important interest of the declarant
- If the statement tends to expose the declarant to criminal liability and is offered to exculpate the accused it is not admissible unless there is corroborating circumstances that clearly indicate the trustworthiness of the statement.
  - Mixed motive statements are difficult to determine if they are really against the interest of the declarant, such as plea negotiations or discussions with police for leniency. Statements showing accomplice liability can be very tricky.
  - Need to go piece by piece through the statement to see if it is really against the declarant’s interest.
  - The context of the statement does not matter. Even if the declarant did not think that it would be against his interest but the contents of the statement have that effect, it is ok. (i.e. telling your girlfriend you robbed a bank and thinking she’d keep it secret.)

- 804(4) Statement of personal or family history
  - A statement concerning the
    - (A) Declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or family history or ancestry, is admissible even though the declarant has no means of acquiring personal knowledge of the subject, or
    - (B) A statement about the above matters or death of another person, if the declarant was related to the other by blood, adoption, marriage or was so intimately associated with the other’s family as to likely have accurate information.
  - None of these exceptions apply is there has been actions procuring the unavailability of the declarant.

- 807 Residual Hearsay Exceptions
  - Statements that are not covered by Rule 803 and 804 but that have equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule if
    - (A) The statement is offered as evidence of a material fact
    - (B) The statement is more probative on the point for which it is offered then any other evidence which the proponent can procure through reasonable effort
• (C) The general purposes of the rules and the interests of justice will be best served by admission of the statement into evidence.
  o The circumstances of the statement are the most important. Should look for memory, accurateness, narration, ambiguity, sincerity, etc.

• Impeachment and Examination of Witnesses
  o 601 Witness Competency
    ▪ FRE says the competency of witnesses is controlled by state law when testifying in connection with substantive issues that are controlled by state law. All other situations say that witnesses are competent with the exception of judges and jurors
  o 602 Personal Knowledge
    ▪ proponent of the witness must introduce evidence that gives a basis on which the trier of fact can reasonably conclude witness has personal knowledge of what they are testifying to.
  o Impeachment using conviction of past crimes – 609
    ▪ Admissible to show that witness does not have respect for society’s rule of conduct, may have a propensity to lie and b/c of this propensity the witness may have lied while testifying
    ▪ Exception to the general bar against propensity
    ▪ Crimes of dishonesty or false statements
      ▪ Usually admissible in crimes which involve circumstances in which truth telling is required and wrongdoer chose to lie
    ▪ Other crimes
      ▪ Must be punishable by death or prison for more than one year
      ▪ Must pass balancing test
        ▪ If criminal Δ is the witness use a reverse 403 test – the probative value must outweigh the prejudicial value of the evidence
        ▪ All other witnesses use a traditional 403 test
      ▪ Courts will look to see if the credibility of a witness is really important
      ▪ Crime cannot be more than 10 years old, subject to a pardon or juvenile adjudication
  o Prior Bad Acts
    ▪ Extrinsic evidence is not allowed to show prior bad acts when admitted for impeachment purposes
    ▪ Witness can be questioned about past bad acts that did not lead to a conviction if relevant, but only this testimony is ok – must be taken at value
    ▪ Questioner must have a good faith basis for the question
    ▪ Must be asked during cross
  o Character evidence for truth telling 608(a)
- Impeaching witness can give negative information about the testifying witness by
  - Describing the testifying witness’s reputation for truth telling
  - Giving opinion of testifying witness’s truth telling
- Cannot try to show propensity for truth telling until it has been attacked
  - Bias
    - Cross examiner can ask questions about sources of bias.
      - Can be family ties, financial ties, membership in organizations, etc
  - Sensory or memory
    - Cross can ask about ability to see, hear and the circumstances surrounding what is being testified to.
    - Extrinsic evidence is allowed
  - Contradiction
    - If some of the witness’s testimony is factually incorrect, proof of that is admissible, whether mistakes in fact are intentional or accidental
    - Cannot bring in extrinsic evidence unless the particular details of witness’s testimony is subject to proof even if witness has not referred to them
      - Not collateral
      - Cannot use extrinsic evidence for collateral matters
  - Prior Statements by Witness 613(a)
    - Cannot be relied upon for the truth but can be to admitted to show dishonesty of the witness
    - Cross can ask the witness about the statement w/o showing it to the witness (if written) and w/o saying in advance what is in the prior statements
    - Can bring in extrinsic evidence. If one does, witness who made the statement must be given an opportunity to explain the past statement.
- Expert Testimony
  - 701 – Lay Opinions
  - 702 – Testimony by Experts
    - Can be used for anything with scientific, technical or specialized knowledge
      - Not the credibility of witnesses
    - Must be qualified as a witness through education, experience, skill, etc. The court holds great discretion for when one is qualified
    - The testimony must be based on sufficient facts or data, be a product of reliable principles and methods and the witness must have applied the principles and methods reliably to the facts of the case
      - 2000 Amendment to the rule codifying Daubert and Kumho
Daubert says that the trial judge is the gatekeeper for the admission of expert testimony and must examine the scientific method use and the application of such to the factual inquiry at case. Can include factors such as:

- Can it be tested? Has it been?
- Has it been published and subjected to peer review?
- What are the known or potential error rates?
- Are there standards to control operations and if yes, were they used here?
- Has it achieved a degree of acceptance in a relevant community?

Kumho applied Daubert to all expert testimony:

- The review of the court’s allowance of expert testimony is subject to an “abuse of discretion” standard, so it is rarely overturned.
  - A witness can testify anyway they choose, but cannot testify about specific mental state of the defendant if it is an element of the crime in the criminal trial.

703 - Basis of Expert Opinion Testimony

- The facts and data relied upon by an expert do not need to be admissible at trial in order for the opinion to be admissible.
- The facts must have been reasonably relied upon to reach the conclusion the expert did.
- If the basis was made on inadmissible facts or data, it should not be admitted to the jury unless the judge determines it is necessary for the jury to understand and it outweighs the prejudicial effect on opponents case.

705 – Disclosure

- Unless otherwise required by the court, the expert should not give the basis of his opinions.
- Can be revealed on cross examination.